United States Postal Service *and* Susan Martinez *and* Pilar Shaon Livingston *and* Denine Latoya Cooper *and* Roger Mark Bowden *and* Brenda Davette Bellamy *and* Mid-Hudson Area Local #3722, American Postal Workers Union. Cases 2–CA–29200(P), 2–CA–29211(P)–1, 2–CA–29211(P)–2, 2–CA–29221(P)–3, 2–CA–29216(P), and 2–CA–29224(P)

September 26, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 28, 1998, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Union filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because of their exercise of their right to engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer Pilar Livingston, Denine Cooper, Roger Bowden, Brenda Bellamy, Susan Martinez, and Joseph Wilson Jr. full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights or privileges previously enjoyed.

(b) Make the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Newburgh, New York facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including places where the notice to the employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

[1] The judge's conclusions of law have been corrected to include the inadvertently omitted name of employee Brenda Bellamy.

[2] The Order has been modified to provide the appropriate remedial provisions, including the conditional notice mailing requirement required in *Excel Container, Inc.*, 325 NLRB 17 (1997).

[3] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because they engage in union or other concerted activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's order, offer Pilar Livingston, Denine Cooper, Roger Bowden, Brenda Bellamy, Susan Martinez and Joseph Wilson, Jr. full reinstatement to their former positions, or if these positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above-named employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Pilar Livingston, Denine Cooper, Roger Bowden, Brenda Bellamy, Susan Martinez and Joseph Wilson Jr., and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

UNITED STATES POSTAL SERVICE

Rita C. Lisco, Esq., for the General Counsel.
Andrew L. Freeman, Esq., for the Respondent.
Craig D. Robinson, Esq. (Brousseau & Robinson), for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on May 12 and 13, 1998, in New York, New York.

During the month of March 1996, unfair labor practice charges were filed by Mid-Hudson Area Local 3722, American Postal Workers Union (the Union), and various individuals set forth in the above caption, against the United States Postal Service (the Respondent).

On December 19, 1997, the Regional Director of Region 2 issued a consolidated complaint and notice of hearing in this matter alleging that Respondent had violated Section 8(a)(1) and (3) of the National Labor Relations Act, by discharging various individuals employed by Respondent because they engaged in protected concerted activities.

On the entire record, including my observation of the demeanor of the witnesses and a careful consideration of the briefs filed by counsel for the General Counsel, counsel for the Union, and counsel for Respondent, I make the following findings of fact and conclusions of law.

Respondent provides postal services for the United States and operates various facilities throughout the United States in the performance of that function, including its Mid-Hudson Processing and Distribution Center, located in Newburgh, New York, the only facility involved in this proceeding. The Board has assisted jurisdiction over Respondent by virtue of Section 1209 of the Postal Reform Act.

It is admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The facts of this case are essentially not disputed.

Respondent and the Union have maintained a collective-bargaining relationship for approximately 21 years. The most recent collective-bargaining agreement was negotiated between the National Union (National) and Respondent and covers the period October 1, 1995, through November 20, 1998. The unit represented by the Union consists of all full-time and regular part-time mail clerks as well as "transitional employees." Article 30 of the National Agreement provides for local implementation of the parties' agreement through memoranda of understanding. The (Local) Union negotiated such a memorandum of understanding with (local) Respondent to cover unit employees at the facility at issue here. Timothy Vaughn, chief shop steward, and Edmund Cubas, manager of distribution operation, were involved in the negotiations for the most recent agreement (the Local Agreement, or LMOU). This agreement was signed on September 30, 1992, and is continuing in effect to the present time. Article 8, section 1 of the Local Agreement provides for 1-hour advance notice of overtime. That language reads as follows:

> 1. When management determines the need for overtime employees will be given one-hour advance notice that they will be required to work, as far as practicable.

Sometime in 1993, the Local Union had occasion to file a grievance regarding the 1-hour provision of the Local Agreement. That grievance resulted in a signed agreement, on March 31, 1993, which settled the grievance and expanded the provision concerning advance notice of overtime (art. 8, sec. 1). The above grievance had arisen when a transitional employee, Shari Thayer, was consistently being told to work overtime with less than an hour's notice, and being threatened with discipline if she refused to work the overtime. The Local Union took the position that it wanted some "real teeth for the future to protect the transitional employees from this type of conduct and this violation of their contractual rights." The grievance settlement was based upon article 8.1 of the Local Agreement, but went a step further, by providing that transitional employees who are not given an hour's notice of overtime and who do not remain for the overtime will not be threatened with discipline. The relevant portion of that agreement is as follows:

> At issue in the grievance(s) is the Grievant's contention that Management is violating Article 8.1 of the

> LMOU by not giving the grievant one-hour advance notice, when they are required to work overtime.
>
> Upon full discussion and consideration, it is determined that the grievance(s) is/are settled.
>
> The reason for this decision is that Management will adhere to Article 8.1 of the LMOU and give the transitional employees advance notice of overtime as far as practicale (sic). Transitional employee (sic) not given prior notice of overtime, and who cannot remain for the overtime will not threaten (sic) with discipline for there (sic) actions.

Respondent officials, union officials, and all unit employees were aware of this amendment to article 8.1 of the LMOU. After that agreement was signed, there were many instances of employees who were not given an hour's notice and did not remain for overtime, and who were not disciplined in any way. Sometime, on or about January 1996, several transitional employees complained to the Union that they had been ordered to work overtime but had not been given an hour's notice. Chief steward, Timothy Vaughn sought out Cubas, an admitted supervisor, and reminded him of the amendment to article 8.1, and informed him that the employees had not been given the appropriate notice. Vaughn requested that Cubas advise the supervisors to inform the transitional employees that they were not required to work the assigned overtime because the Employer had not met its obligation to notify them an hour beforehand. Cubas agreed and took care of it.

On the evening of February 14 and into the early morning of February 15, 1996, a group of transitional employees were working their shift which was scheduled to end at 1:30 a.m. At approximately 12:45 a.m., Acting Supervisor Lori Huschle went by the LSM's and notified the employees that they had to work 2 hours overtime.[1] Huschle told employees if they had a problem with staying for the overtime because they hadn't been given the hour's notice, or if there was any other problem, they should speak to the supervisors, Jerry Fiber or Bernice. Shortly afterward Fiber spoke to the same employees ordering them to stay an additional 2 hours. When employees protested about working the overtime, Fiber simply told them to grieve it with the Union the next day.

At 1:15 a.m., when employees were given a break, the transitional employees arrived at the union office and complained to the union stewards that they had been ordered to work overtime without a 1-hour notice. One of the shop stewards, Laurie Wagger, left the union office to get the agreement, the amendment to article 8.1, from the bulletin board, then went to speak with Fiber about it. Wagger showed Fiber a copy of the agreement and told him if he did not give an hour's notice the employees did not have to stay, but Fiber stated they did have to stay. Wagger repeated they did not have to stay. Fiber walked away and slammed the door. When Wagger returned to the union office she told employees they were within their rights to leave. All six of the transitional employees, Pilar Livingston, Denine Cooper, Roger Bowden, Brenda Bellamy, Susan Martinez, and Joseph Wilson Jr. punched out and left the facility at approximately 1:30 a.m. or shortly thereafter. The following day, each of them was notified that they had been discharged, for their refusal to work the overtime.

The Union filed grievances concerning the termination of the six transitional employees, alleging that the employees were terminated because of their protected concerted activities. The grievance was referred to arbitration, and a hearing was held before Arbitrator Thomas J. Fritsch on June 11, 1997. The arbitrator's award issued on July 21, 1997. The arbitrator's decision held that the grievances in this matter were not arbitrable because the Union had not met its burden of proving the Employer's actions were in retaliation for protected concerted activities. In his decision, the arbitrator finds that the grievants "decided to take matters in their own hands by refusing to work the required overtime." The arbitrator further stated, "I find that the Service in this matter took the termination actions because the grievants refused to work overtime, not because they engaged in protected concerted activity."

Analysis

The Board has held "as a matter of law, when parties by mutual consent have modified at mid-term a provision contained in their collective-bargaining agreement, that lawful modification becomes part of the parties' collective-bargaining agreement. . . ." *St. Vincent Hospital*, 320 NLRB 42, 44–45 (1995).

In the instant case the amendment to article 8.1 came about as a result of a threat to discipline an employee if she refused to work overtime, notwithstanding that she was not given the 1-hour notice required by article 8.1. This threat was taken to arbitration by the Union because Respondent interpreted such provision of their collective bargaining to require the employee to work the overtime, notwithstanding the failure of Respondent to give 1 hour's notice, and to grieve later. The Union took the position at the arbitration that Respondent's interpretation of article 8.1 would render the article useless.

As a result of the arbitration, an agreement was reached by the parties to amend article 8.1 as described above, so that it would be crystal clear that employees not given 1-hour's notice would not have to work the overtime, and would not be disciplined for such refusal.

Following this amendment, there were a fair number of instances when employees were ordered to work overtime with less than an hour's notice, and in no case was any employee discharged, or otherwise disciplined for his or her refusal to do so.

Thus, I conclude that the amendment to article 8.1 gave the employees the contractual right to refuse an order to work overtime, unless at least 1 hour's notice was given prior to the time such overtime was to begin without being disciplined in any way. I also conclude that Respondent from March 1993 when article 8.1 was amended, until February 15, 1996, adhered to such contractual provision.

It is undisputed that following the amendment to article 8.1 employees who were ordered to work overtime without the required 1 hour's notice terminated or otherwise disciplined for such refusal.

[1] The exact time may be in dispute, however, there is no dispute that such notice was given less than 1 hour before the overtime was to begin.

It would appear that the employees at issue were discharged in clear violation of the terms of their collective-bargaining agreement. However an arbitrator concluded such discharge was because the employees refusal to work, and grieve later and not because they engaged in protected activities.

It is well established that an employee who relies upon reasonable interpretation of a contractual right and exercises that right is engaging in protected concerted activities by doing so. *NLRB v City Disposal Systems,* supra. In the instant case, as set forth above, the Union had an amendment to article 8.1 with Respondent which required Respondent to give employees at least 1 hour's notice of overtime, and not to discharge, or otherwise discipline employees for refusing to work such overtime, if such notice was not given. For several years this amendment was agreed upon. Respondent adhered to the agreement, and no employee who refused overtime because he or she was not given such hour's notice was discharged or otherwise disciplined.

The Board has long held that employees who attempt to enforce the provisions of a collective-bargaining agreement are engaging in protected concerted activity. *Interboro Contractors, Inc*., 157 NLRB 1295, 1298, 61 LRRM 2083 (2d Cir. 1967). The Supreme Court in *NLRB v. City Disposal Systems, Inc*., 465 U.S. 822 (1984), discussing the Board's *Interboro* doctrine stated:

> The Board's *Interboro* doctrine . . . mitigates that inequality throughout the duration of the employment relationship, and is, therefore, fully consistent with congressional intent. Moreover, by applying Section 7 to the actions of individual employees invoking their right under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process, for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also into the entire process envisioned by Congress as the means by which to achieve industrial peace.

City Disposal Systems, 465 U.S. at 835–836.

The actions of the transitional employees involved in this case are similar in nature to those of the employee in *City Disposal Systems* who, relying upon his contractual provision which stated that the Employer shall not require employees to operate equipment which was in an unsafe working condition, refused to perform his job when he was ordered to operate vehicle he reasonably believed was unsafe and was discharged. The Supreme Court upheld the Board's conclusion, based upon its *Interboro* doctrine, that the refusal to work in that case was itself concerted activity, in that the employee was honestly and reasonably relying upon a contract right. The Court reasoned that it would not make sense "for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer." *City Disposal Systems*, 465 U.S. at 832. The Court further explained that when the employee invoked a right grounded in the collective-bargaining agreement, he was

> in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from [the Employer] that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown [the discriminatee] was reassembling his fellow union members to reenact their decision to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

Id.

In the present case, the transitional employees invoked their contractual right to refuse to work the overtime, in effect, reminding their employer of the promise the Union had extracted, on their behalf, that they would not be forced to work overtime when they had not received an hour's notice.

In the instant case, the employees clearly acted together in invoking their contract rights, but, even if they had acted alone, like the discriminatee in the *City Disposal Systems'* case, they would have been protected in their action. Like the discriminatee in the *City Disposal System's* case, they were engaging in protected concerted activities when they refused to work overtime that night.

I further conclude that Respondent terminated their employment for engaging in such protected concerted activity in violation of Section 8(a)(1) and (3) of the Act.

Respondent contends that the Board should defer this case to the arbitrator's award. The arbitrator's decision concluded that the alleged discriminatees were justly terminated for "insubordination" which was their refusal to work the overtime ordered by Respondent on February 14.

In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board set forth its criteria for determining whether deferral to an arbitration award is appropriate. In that case, the standards to be weighed are whether: (1) The proceeding was fair and regular; (2) All parties agreed to be bound, and (3) The decision was not clearly repugnant to the purposes and policies of the Act. Subsequently, an additional criterion was added for consideration. That is, that the issue involved in the unfair labor practice case must have been presented to and considered by the arbitrator. *Olin Corp*., 268 NLRB 573 (1984). The Board also explained the "clearly repugnant" standard. The Board stated, "Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer." *Olin*, at 574.

The facts of this case establish conclusively that the discriminatees refused to work because Respondent breached its contractual obligation set forth in their collective-bargaining agreement with the Union requiring at least 1 hour's notice before an overtime assignment, and that if such 1 hour's notice were not given, the employees assigned to such overtime would not be forced to work and could not be disciplined for such refusal.

As set forth above, employees who attempt to enforce provisions of a collective-bargaining agreement are engaging in concerted protected activity. Such protected activity includes a reasonable belief that such provisions are being violated. *In-*

terboro, and City Disposal Systems, supra. The arbitrator's decision herein ignored *City Disposal*, its progeny, and the parties' collective-bargaining agreement. Rather he dispensed his own crude hand of industrial justice.

Accordingly, I conclude the arbitrator's decision is wrong, repugnant to the Act, and should not be differed.

CONCLUSIONS OF LAW

1. Respondent is subject to the Board's jurisdiction by virtue of Section 1209 of the Postal Reform Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging its employees Livingston, Cooper, Bowden, Martinez and Wilson, Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Respondent, having discriminatorily discharged the discriminatees, described above, in violation of the Act, must offer reinstatement to them to their former positions, without prejudice to their seniority or other rights, or if such positions do not exist, to a substantially equivalent positions and make them whole for any loss of earnings and/or other benefits they may have suffered since their working hours were reduce, computed on a quarterly basis less any interim earnings as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall also remove from its records all references to their discharge and notify them in writing that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, United States Postal Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee because they engage in protected concerted activities.

2. Take the affirmative action necessary to effectuate the policies of the Act.

(a) Offer the above-named discriminatees their former positions, without prejudice to their seniority or other rights, or if such positions do not exist, to a substantially equivalent positions, and make them whole for any loss of earnings and/or other benefits they may have suffered, commuted on a quarterly basis less any interim earnings as prescribed in *New Horizons for the Retarded,* supra.

(b) Remove from its records all references to the above-named discriminatees discharged and notify them in writing that this has been done.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Newburgh, New York facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including places where the notices to the employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material

(e) Notify the Regional Director in writing within 20 days from the date of the Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."